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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BECHTEL POWER CORPORATION, *Petitioner,*

v.

COMMONWEALTH OF PENNSYLVANIA AND RAYMOND WILLIAMS, WILLIE MCKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., ARIEL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD, AND FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL CONSTRUCTORS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

This brief is submitted by the National Constructors Association as an amicus curiae pursuant to Rule 36 of this Court.

The National Constructors Association (herein NCA) is a non-profit, voluntary association composed of fifty-five of the Nation's largest, unionized construction contractors.[1] NCA member companies design and construct industrial facilities throughout the United States and abroad. These facilities include nuclear and fossil fuel electric power plants, oil refineries, pipelines, chemical and petrochemical plants, mining and metallurgical facilities, paper mills, and many other industrial processing facilities.

NCA member companies perform their construction projects using union represented labor. Typically, NCA member companies do not retain a permanent workforce of construction employees. Rather, for each project they hire and employ skilled building trades workers in the area of the project under the terms of national collective bargaining agreements with international unions in the building trades. Since the construction of a large industrial facility may require the employment of ten or more crafts, an NCA member may have collective bargaining relationships with all or many of the building trades' international unions.

The collective bargaining agreements signed by NCA members take diverse forms.[2] However, they possess

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[1] Petitioner Bechtel Power Corporation is a member of the National Constructors Association.

[2] Some are multi-craft, regional agreements, such as the National Industrial Construction Agreement, which is between the NCA, on behalf of its member companies, and nine international unions. This agreement covers NCA member companies' construction projects within a 14-state area in the South and Southwest. NCA member companies also frequently sign multi-craft "project" agreements with international unions and their subordinate local unions, covering construction of a single large project. While these

one common attribute: each obligates the contractor to hire craft employees for its projects through the hiring halls maintained by the international unions' local union affiliates with jurisdiction at the project site.

Under this system of doing business, it is not uncommon for a national contractor to use local hiring halls of several craft unions on each of its construction projects. Accordingly, the district court's decision in this case, that liability for a discriminatorily operated hiring hall may be imposed on any employer using the hiring hall, is of vital interest and utmost concern to the NCA and its member companies.

REASONS FOR GRANTING THE WRIT

Under the district court's holding, any contractor receiving a referral through a discriminatorily operated hiring hall is held strictly accountable for acts of racial discrimination practiced solely by the union operator of the hiring hall. The district court's opinion not only signals a fundamental departure from previously accepted legal principles developed under 42 U.S.C. § 1981, but it ignores and conflicts with established collective bargaining practices in the construction industry which have received Congressional scrutiny and approval. In so doing, the district court's

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contracts are binding on the locals, the locals may or may not be signatories. Most NCA members also are signatory to "National" agreements with one or more international unions. These agreements govern the employment of a specialized construction craft on the company's projects throughout the United States. See generally *The Bargaining Structure in Construction: Problems and Prospects*, U.S. Department of Labor-Management Services Administration, 1980, pp. 4-5.

opinion undermines important federal objectives and endangers these historic, and Congressionally sanctioned, collective bargaining practices.

Moreover, the decision places an inequitable burden on contractors who have no control over the operations of these hiring halls, have no choice regarding their use, and, in many circumstances, particularly where national agreements are involved, no practical way to ascertain each local's referral practices. Federal law has sanctioned the establishment of the hiring hall system in construction and has brought about monopoly control over the unionized labor pool. Federal law also sanctions the employers' use of these institutions through collectively bargained agreements entered into as a result of actual or threatened strikes, picketing or the withholding of labor. The decision below ignores such realities and treats construction union hiring halls as if they were just another group of employment agencies.

1. If the district court's opinion is permitted to stand, national contractors will be placed in an extremely serious and grave dilemma. Because national contractors normally obtain referrals from several different hiring halls on each of their several projects, the district court's opinion exposes them to strict liability for the operations of each of these hiring halls. The sole avenue available to contractors to avoid this immense liability is the restructuring or abandonment of the hiring hall system since, as described *infra*, pp. 9-12, federal labor law policies and industry practices preclude the attainment of effective safeguards against union hiring hall discrimination through negotiations. However, measures as draconian as the abandonment or restructuring of the hiring hall system in

themselves will needlessly encourage labor strife and undermine the recognized benefits from the hiring hall system.

To begin with, it is impractical for contractors in the construction industry to abandon the hiring hall system. Union operated hiring halls provide a ready pool of skilled labor in the geographic area where the construction work is to be performed. Construction companies, by contacting the hiring halls, can determine the availability and cost of labor before estimating and bidding projects. The hiring hall thus serves a crucial function that permits the bidding and construction of large, and frequently geographically remote, projects. Indeed, this Court and Congress both have commented favorably on the essential role fulfilled by hiring halls in the construction industry:

> The [National Labor Relations] Board recognizes that the hiring hall came into being "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." The hiring halls at times have been a useful adjunct to the closed shop. But Congress may have thought that it need not serve that cause, that in fact it has served well both labor and management—particularly in the maritime field and in the building and construction industry. In the latter, the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; and a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment". (Footnotes omitted.)

Local 357, *International Bro. of Team., etc.* v. *N.L.R.B.*, 365 U.S. 667, 675-676 (1961). And, as this

Court also observed, Congress made clear the view that hiring halls are useful:

> In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall. . .

S. Rep. No. 1827, 81st Cong. 2d Sess. pp. 13, 14.

By the same token, contractor efforts at restructuring the hiring hall system to install employer control against union racial discrimination would subject contractors to strikes and coercive actions by the affected unions, thereby destabilizing the collective bargaining structure in the construction industry. Hiring halls are embedded in the fabric of construction union operations. They have long provided an invaluable tool for unions to service their membership and attract new members. Indeed, NCA and its members are unaware of any major construction craft union that does not, through its affiliated local unions, operate a hiring hall system.

It is, therefore, obvious that any contractor initiated changes in the hiring hall system would be resisted, undoubtedly to the point of a strike, by the construction unions. The sheer size and economic magnitude of the industrial projects constructed by NCA members greatly magnifies the coercive power inherent in the strike weapon.[3] The potential losses attributable

[3] In 1980, NCA member companies performed domestic construction projects with an aggregate value of over 26 billion dollars.

to a strike on such a project make it indefensible to require a contractor to risk strikes in an effort to halt the union's self-generated discrimination.

The forecast of a strike over hiring hall operations is not a chimera. The district court found that Defendant Operating Engineers Local 542 conducted strikes of several weeks' duration to compel employer acceptance of its hiring hall. Local 542's insistence on, and strike over, a hiring hall has many parallels among other craft unions. Given this resort to economic warfare to achieve the hiring hall, it is improbable that unions would relinquish any portion of their total control over the hiring hall absent a strike.

Nor does an NCA member contractor have alternatives to the unions and their hiring halls. Since each craft union has a monopoly over the workers in its particular trade, a contractor performing unionized construction must develop a collective bargaining relationship and use the hiring hall to obtain workers in that trade. A contractor cannot, for example, obtain skilled pipefitters from the Ironworkers Union. Moreover, in many instances the unions, through their hiring halls, are the sole source of the large numbers of skilled tradesmen required to perform the construction of large industrial facilities. Additionally, some clients of NCA members require that their projects be built entirely with union labor thereby obligating the contractor to use the craft unions and their hiring halls.

Finally, even if a contractor could bypass a union that practiced discrimination in its hiring hall and obtain referrals from another source, the contractor would be unable to construct the project as a union

constructor because the other unionized trades would undoubtedly refuse to work alongside such employees.[4]

In short, the district court's opinion confronts contractors with a Hobson's choice: either incur liability for the unions' discriminatory conduct in operating the hiring halls used by the contractor or risk coercive union action and/or termination of the hiring hall system by efforts to curb the unions' discrimination. The Amicus submits that no statutory nor policy objective justifies such a result.

2. The district court's application of agency principles to hold the contractor liable for the acts of the union hiring hall is clearly erroneous because it ignores the unions' coercive action that compels contractors to accept the hiring hall. To be valid, an agency relationship must be consensual. See Restatement (Second) of Agency § 15 (1957). Accordingly, where, as here, unions may, and do, lawfully use coercion or threats of coercion through strike activity to obtain employer agreement to hiring halls, the application of agency principles to assess liability against the employer is improper because the use of the hiring hall is not voluntary. The hiring hall structure in the construction industry therefore contrasts sharply with employment agencies in other industries where the employer voluntarily selects the agency. The district court's failure to consider and apply these differences fatally flaws its decision.

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[4] The refusal of union workers on construction sites to work with non-union brethren is a well-documented fact that, to a certain degree, has been accommodated by Congress and recognized by this Court. See *Connell Construction Co.* v. *Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

3. Under the district court's decision, national contractors, such as NCA members, are liable for a union's discriminatory operation of a hiring hall notwithstanding that the contractor is powerless to prevent the union's unlawful discrimination and frequently has had no contact with the union regarding the hiring hall. As noted, national contractors enter national collective bagaining agreements with one or many building trades international unions. These agreements provide that the national contractor will adopt on its projects many terms of the labor contracts negotiated by the international union's affiliated local union in the area. The adopted conditions universally include the obligation to use the local union's hiring hall.

As a general rule, the local unions neither negotiate nor sign National Agreements. Instead, the national contractor merely notifies the local union that the project will be performed under the terms of the National Agreement and requests employee referrals from the hiring hall. National contractors, thus, do not negotiate with the local unions concerning the establishment or operation of hiring halls or any other term or condition of employment. Hence, they are unable to negotiate antidiscrimination safeguards into the hiring hall operation.

Much more significant, however, is the fact that the contractor is legally powerless to negotiate antidiscrimination safeguards even if it has the opportunity to bargain with the local unions about hiring hall operations. The contractor's collective bargaining agreements, in many instances, are prehire agreements since they necessarily antedate the start of construction and the hiring of employee complements. The National Labor Relations Board, with this Court's ap-

proval, holds that there is no statutory bargaining duty concerning prehire agreements in the construction industry. *R. J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), enf. denied *sub. nom. Engineers Local 150* v. *N.L.R.B.*, 480 F.2d 1186 (D.C. Cir. 1973); *N.L.R.B.* v. *Local U. No. 103, Intern. Ass'n., etc.*, 434 U.S. 335 (1978).

The absence of a statutory bargaining duty means that the unions have no obligation to negotiate with a contractor about prehire agreements. This encompasses the right to refuse to participate in negotiations regarding the elimination or prohibition of discrimination in the operation of the unions' hiring halls. Indeed, it is the experience of NCA members that building trades unions frequently offer contractors national labor contracts only on a "take it or leave it" basis. The proferred agreements universally include obligations to accept the local union hiring hall "as is" and the "take it or leave it" basis effectively precludes any contractor efforts to prevent or deal with discriminatory practices. The district court completely disregarded these factors and its decision imposing liability on national contractors because of the union's discrimination in such circumstances is manifestly unjust.

Apart from these obstacles to a contractor's ability to ensure against union discrimination in the operation of the hiring halls, the very nature of construction operations makes it virtually impossible for a national contractor to learn of the discriminatory operation of a union hiring hall. Construction projects typically are of relatively short duration. A contractor's utilization of a particular craft and hiring hall may be limited to only a portion of the project. During this brief time

span, the national contractor lacks any means of determining if discrimination infects the hiring hall apparatus. For example, a contractor could not evaluate whether a hiring hall was being operated in a discriminatory manner based on the number of minority referrals that it received. For, notwithstanding a discriminatorily operated hiring hall, a contractor could be referred an inordinate number of minorities and conversely, a non-discriminatory hiring hall could refer a totally white complement to any particular employer.[5]

Nor can national contractors learn of hiring hall discriminatory practices in any other manner. National contractors are frequently strangers to the geographic areas of their projects. Their presence in the locale is transitory and terminates when the project is completed. They rarely are members of the local employer association that negotiates the local collective bargaining agreements including the hiring hall provisions. These contractors, therefore, have neither the opportunity to discuss the operation of the hiring hall during negotiations nor the time to learn of its operations through work experience in the locale. Rather, they are obligated to accept the hiring hall as they find it if they are to perform unionized construction in the area.

The district court's failure to consider this fundamental collective bargaining structure and its decision to impose liability on national contractors in disregard of the constraints placed on them by federal law and

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[5] This apparently occurred in this case since 50% of the referrals from Local 542's hiring hall to one contractor were minorities. See Bechtel Power Corporation Petition for a Writ of Certiorari, p. 17, n. 7.

industry practice requires this Court's review and correction.

4. The district court's decision imposing the injunction and racial quotas on non-party contractors represents a divergence from established legal theories and raises serious questions of due process. These issues need be addressed by this Court. Not the least of these concerns, from the Amicus' perspective, is that the district court's decision, if it becomes the accepted law, raises serious questions regarding the contractors' ability to comply with court-ordered remedial relief.

The members of NCA perform construction work in diverse areas of the United States by utilizing the hiring halls of many different local unions in the various trades. Under the district court's decision, a national contractor, who was party to a collective bargaining agreement with Local 542 and received one referral from that union's hiring hall, is subject to the court's injunctive order and thereby obligated to hire and employ a certain quota of minorities. That same national contractor typically will be performing construction projects in other areas and employing operating engineers from different hiring halls on those projects. If any of those hiring halls have been operated in a discriminatory manner, the contractor could, as a class defendant, be subjected to lawsuits and injunctive decrees issued by the courts in those areas which directly conflict with the relief granted by the district court in this case.

For example, a national contractor subject to injunctive requirements for hiring minorities in this case, could become subject to decrees in other cases regarding the hiring of percentages of females and

whites simply because the contractors used other hiring halls where the unions were found to have engaged in sex or reverse discrimination. It would be difficult, if not impossible, in such circumstances to comply with the courts' orders. The risk that contractors could be subjected to conflicting adjudications is a telling commentary on the impermissible scope of the district court's findings and furnishes a further reason why the Court should review and reverse the erroneous underlying decision.

CONCLUSION

For the reasons stated herein, as well as those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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